Supreme Court, U.S.
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No. 96-

In the
Supreme Court of the United States
October Term, 1996

Duane D. Paisley,

Plaintiff-Petitioner,

vs.

City of Minneapolis,

Defendant-Respondent,

Minneapolis Police Relief Association,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioner, Duane D. Paisley, waived his right of reemployment under 38 U.S.C. § [4324] 2024(d)?

PARTIES

The parties to this proceeding are Duane D. Paisley, The City of Minneapolis and the Minneapolis Police Relief Association.

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The opinion of the Eighth Circuit Court of Appeals is reported at 79 F.3d 722 (8th Cir. 1996). Pet. App. A-1-A-9. The opinion of the district court is unreported. Pet. App. A-10-A-22.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on March 27, 1996. Pet. App. A-1–A-9. A petition for rehearing was denied on May 10, 1996. Pet. App. A-23. The Petitioner has prepared this Writ of Certiorari for review by the United States Supreme Court concerning the March 27, 1996 judgment based on this Supreme Court's jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved is the Veteran's Reemployment Rights Act, 38 U.S.C. § [4321] 2021 et. seq. The full text of the Act is found in the appendix at A-28–A-45. Also reprinted in the appendix are 28 U.S.C. § 1254 and 32 U.S.C. § 502. Pet. App. A-25–A-27

STATEMENT OF THE CASE

This case arose from the denial of Petitioner Paisley's request to be reemployed as a police officer with the City of Minneapolis subsequent to military service. Petitioner, Duane Paisley, commenced this action September 1, 1994 seeking a declaration of his right to reemployment under the Veterans' Reemployment Rights Act. He sought this declaration in federal district court based on the jurisdiction provided under 28 U.S.C. § 1331 and 38 U.S.C. § [4322] 2022.

Petitioner moved for summary judgment, as did the City of Minneapolis and the Intervenor, Minneapolis Police Relief Association. The several motions were heard February 1, 1995. The U.S. District Court for the District of Minnesota, in an Order dated March 31, 1995 and filed April 3, 1995, denied Paisley's motion for summary judgment, concluding that, while Paisley had established that he was entitled to reemployment rights, he had, nevertheless, waived them. Pet. App. A-10–A-22. The Court granted the motions of the City and Relief Association. Paisley appealed to the Eighth Circuit Court of Appeals on the issue of whether he had waived his reemployment rights. The City of Minneapolis and the Relief Association filed a cross-appeal on the issue of Paisley's eligibility for reemployment rights. After hearing the arguments, on March 27, 1996, the Eighth Circuit Court of Appeals affirmed the District Court pursuant to its jurisdiction under 28 U.S.C. § 636(c)(3) and 28 U.S.C. § 1291.

Rehearing was subsequently denied on May 10, 1996. Pet. App. A-23.

Duane D. Paisley was employed in a permanent position as a police officer with the City of Minneapolis, beginning in early June, 1973 and served in that position until January 16, 1980. Pet. App. A-46. He had previously served in the National Guard, having enlisted on June 9, 1965, prior to his beginning employment with the City of Minneapolis, Pet. App. A-46, a municipal employer subject to 38 U.S.C. § [4324] 2024(d), a federal law which describes the obligations of a municipal employer with regard to its civilian public employees who are also members of the military.

Paisley was employed in the permanent position of a police officer with the City of Minneapolis for approximately 5 1/2 years, when, as of November 1, 1979, his military status became that of "Active Guard/Reserve", referred to as "AGR". As a permanent employee of a municipal employer, Paisley had certain benefits and rights under federal law including the right to obtain a leave of absence from his position as a police officer with the City during the continuation of his AGR status with the National Guard, and to reemployment subject to time limitations expressed and controlled by federal law. Pet. App. A-47. Additionally, the applicable employee handbook for the City of Minneapolis, provided at page 22, that:

> As authorized by State Law, you are entitled to leave without pay during military service and to reinstatement to your position when you return. During military leave you continue to earn sick leave, vacation time, pension and seniority rights as if you were actually working...

Pet. App. A-50–A-54.

Paisley continued in his position of permanent employment as a police officer with the City of Minneapolis and in his AGR status with the National Guard, with the City of Minneapolis having granted him a leave of absence from his position as a police officer while he worked full time with the Minnesota National Guard in AGR status. Pet. App. A-47.

On October 17, 1979, the City of Minneapolis indicated by letter to Paisley that he would remain eligible to compete for future promotional exams, even though he was on a leave of absence with the National Guard. On November 15, 1985, Paisley wrote to the City of Minneapolis requesting to take a promotional exam, but the City denied his request to take the Sergeant's examination. Paisley thereafter wrote to the City of Minneapolis requesting reconsideration of its decision on November 20, 1985 but to no avail. Pet. App. A-55–A-56. The inability to sit for promotional examinations had the effect of depriving Paisley of his right to keep pace with opportunities for promotion or seniority advancement with the Minneapolis Police Department. Pet. App. A-47–A-48.

The initial leave of absence granted by the Minneapolis Police Department to Paisley was set to expire on January 15, 1986, and therefore on October 18, 1985, desiring to maintain his AGR status with the National Guard and to work there as a full-time individual, yet maintain his status with the Minneapolis Police Department, he wrote to them requesting that his leave of absence be extended for a period of three years beginning January 15, 1986. Pet. App. A-57–A-59. The City of Minneapolis Police Department denied the request.

Confronted with the fact that the City of Minneapolis had denied his extension of military leave of absence and had refused his right to take promotional examinations, Paisley felt he had no alternative but to resign from his position with the City of Minneapolis Police Department and did so, regretfully, by letter on December 15, 1985. Pet. App. A-60–A-62.

Paisley met with Minneapolis Police Chief John Laux on April 27, 1994 to request that he be reemployed. Subsequently, through his attorney, he requested to be reemployed on May 6, 1994 and July 15, 1994. Paisley was released from active duty and honorably separated on August 31, 1994. Pet. App. A-63–A-66.

ARGUMENT

The Eighth Circuit Court of Appeals decided an important federal question which conflicts with a decision of this Court; and, in doing so, has so far departed from the accepted and usual course of judicial proceedings by sanctioning such a departure, as to call for an exercise of this Court's supervisory power.

More specifically, the District Court concluded that Paisley satisfied the requirements of 38 U.S.C. § [4324] 2024 (d), but had waived his reemployment rights by his "apparent" choice of a military career. The Eighth Circuit Court of Appeals affirmed the District Court's finding of waiver and did not reach the issue of the Petitioner's eligibility for benefits.

Both the District Court and the Court of Appeals were seduced by the seeming similarity of the facts in Smith v. Missouri Pacific Transportation Company, 313 F.2d 676 (8th Cir. 1963). This case is of doubtful authority in the light of this Court's decision in King v. St. Vincent's Hospital, 502 U.S. 215, 112 S.Ct. 570 (1991). The Court of Appeals attempts to distinguish its decision in the present case from the decision of this Court in King by basing its decision not on the length of time the Petitioner ultimately requested as leave from the City of Minneapolis, but rather on "an intent" to make a "military career". Neither the facts of this case nor case law, supports this determination which the Court of Appeals ultimately found constituted a waiver of the Petitioner's reemployment rights.

The Eighth Circuit Court of Appeals decided the Smith case under the former Selective Training and Service Act of 1940, before a number of substantive changes were made during the Vietnam era which, among other changes, extended, for the first time, protection of the federal law to state and local government employees. Importantly, the decision predates the inception of the AGR program and the

express statutory underpinning, provided by Congress, to support the program.

The AGR program was initiated in light of this country's apparent need for a continued defense as its armed forces were scaled back. The AGR program authorizes members of the Reserve components, including the National Guard, to serve full-time tours of duty for the purpose of organizing, administering, recruiting, instructing, or training the reserve components. This program requires a significant time commitment from its members. Paisley served his country under the AGR program. He served in a pivotal support capacity training other personnel.

The Smith court imposed a "reasonableness" standard to determine the appropriateness of a length of leave from employment, the notion of which was struck down in King for veterans under 38 U.S.C. § [4324] 2024(d). Accordingly, Paisley could not have gone "too far" and chosen a "military career" in that the King court concluded that there were no durational limits upon military leaves of absence for AGR personnel.

King is primarily a statutory construction case. The Court noted that Congress is presumed to legislate with knowledge of the basic rules of statutory construction. King, 112 S.Ct. 570, 574, n.9 (1991), citing McNary v. Haitian Refugee Center, Inc., 498 U.S. 479, 111 S.Ct. 888, 898 (1991). The Court also acknowledged that long leaves of absence could be "ungainly" and "burdensome" on employers. King, 112 S.Ct. at 573. However, any durational limit is for Congress to address. Indeed, Congress has now addressed the issue in passing the Uniformed Services Employment and Reemployment Rights Act of 1994, which amends Chapter 43 of Title 38 to limit military leaves of absence, generally, to five years. This legislation took effect December 12, 1994. See Pub. L. 103-353. This legislation is an express

acknowledgement by the Congress of the need to legislate to establish an appropriate durational limit in light of King.

Paisley's nominal "resignation" in 1985 is anything but the "clear and unequivocal" indication that he intended to waive his rights under the Veterans' Reemployment Rights Act. "It must be shown that he was aware of the rights he gives up and that he fully intended to abandon them." Loeb v. Kivo, 169 F.2d 346, 349 (2d Cir. 1948), cert. denied, 335 U.S. 891, 69 S.Ct. 246. There is no indication in the December 15, 1985 letter that Paisley intended to give up his rights. Indeed, on its face, the letter bespeaks reluctance, regret and compulsion. It is significant that the letter gives no indication of waiver. This is the type of document that courts look to for evidence of a "clear and unequivocal" indication of waiver. U.S. ex rel Reilly v. New England Teamsters, 737 F.2d 1274, 1278 (2nd Cir. 1984). The letter, in fact, belies the notion that Paisley was choosing a military career over his police position. It recites his diligence in maintaining his police qualifications and the experience gained in military service which would contribute to his effectiveness as a police officer.

The United States Department of Labor is the lead agency providing assistance to veterans seeking reemployment under the Veterans Reemployment Rights Act. 38 U.S.C. § [4325] 2025. The department has published a "Veterans Reemployment Rights Handbook" which has been accorded notice by this Court. See King, 112 S.Ct. at 575, n.14. The Handbook is cited, approvingly, by the Court in Leonard v. United Air Lines, 972 F.2d 155, 159 (7th Cir. 1992) for the proposition that, "[i]n all but the most unusual circumstances, a veteran cannot expressly or impliedly waive his reemployment rights before or during military service." Id. Chapter 22 of the Handbook provides a thorough discussion of the issue of waivers in the contest of veteran reemployment rights. Plaintiff commends it to the Court in support of the

conclusion that Plaintiff has not waived his reemployment rights. See Pet. App. at A-67–A-80.

Based on the Eighth Circuit Court of Appeals departure from the accepted and usual course of judicial proceedings by denying a veteran his reemployment rights in direct conflict with the congressional mandate and in opposition to this Court's determination in King v. St. Vincent Hospital, the Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the opinion of the Eighth Circuit Court of Appeals filed March 27, 1996.

Dated: August 8, 1996

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-2084

Duane D. Paisley,	*	
	*	
Plaintiff-Appellant,	*	
	*	
v.	*	
	*	Appeals from the United States
City of Minneapolis,	*	District court for the
	*	District of Minnesota.
Defendant-Appellee,	*	
	*	
Minneapolis Police Relief	*	
Association,	*	
	*	
Intervenor-Defendant.	*	

No. 95-2175

Duane D. Paisley,	*
	*
Plaintiff-Appellant,	*
	*
v.	*
	*
City of Minneapolis,	*
	*
Defendant-Appellant,	*
	*

Minneapolis Police Relief Association, *

Intervenor-Defendant. *

No. 95-2177

Duane D. Paisley, *

Plaintiff-Appellee, *

v. *

City of Minneapolis, *

Defendant, *

Minneapolis Police Relief Association, *

Intervenor-Defendant-Appellant. *

Submitted: December 15, 1995

Filed: March 27, 1996

Before BOWMAN and LOKEN, Circuit Judges, and WOLLE,* District Judge.

BOWMAN, Circuit Judge.

Duane D. Paisley appeals from the order of the District Court[1] granting summary judgment to the City of Minneapolis and to the Minneapolis Police Relief Association on his claims for reinstatement, with seniority, to the City's police department and for payment for sick leave and vacation time, and for pension benefits, all as accrued from January 16, 1980. Paisley's claims were made pursuant to the Veterans' Reemployment Rights Act, 38 U.S.C. §§ 2021-2027 (1988 & Supp. III, 1991),[2] but the court concluded that he had waived

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*The HONORABLE CHARLES R. WOLLE, Chief Judge, United States District Court for the Southern District of Iowa, sitting by designation.

[1] The case was adjudicated by The Honorable Ann D. Montgomery, United States Magistrate Judge for the District of Minnesota, upon the consent of the parties pursuant to 28 U.S.C. § 636(c) (1) (1994).

[2] The Veterans' Reemployment Rights Act was renumbered 38 U.S. C. 4301-4307 (Supp. IV 1992) in October 1992. Pub. L. No. 102-568, 506(a), 1992 U.S.C.C.A.N. (106 Stat.) 4320, 4340. (Later amendments, now codified at 38 U.S.C. §§ 4301-4333 (1994), became effective "with respect to reemployments initiated on or after the first day after the 60-day period beginning on" October 13, 1994, and so are not applicable here. Pub. L. No. 103-353, § 8, 1994 U.S.C.C.A.N. (108 Stat.) 3149, 3175.) Although Paisley's complaint was filed on September 1, 1994, it refers to sections of the Act as they were numbered before October 1992, and the District Court opinion followed suit. For the sake of continuity, we also will refer to the pertinent sections under the numbering scheme as it existed before it was changed in 1992. Also, to avoid confusion, we will forego our usual practice of citing United States Code dates parenthetically when citing sections of the Act as they were numbered before October 1992.

whatever rights he may have had under the Act. The City and the Relief Association cross-appeal, arguing that the court erred, notwithstanding its decision to grant summary judgment in their favor, by holding that Paisley came within the Act in the first place. We affirm the summary judgment.

I.

Paisley joined the National Guard in 1965, and until 1980, apart from occasional longer-term training, he served the traditional reserve component duty of thirty-nine days of training a year--one weekend a month plus fifteen consecutive days of active duty for training. In 1973, Paisley began work as a patrolman with the City's police department. Late in 1979, he requested, and was granted, a two-year leave of absence from his employment with the City to go on active duty with the National Guard. In 1981, Paisley requested a two-year extension of his leave, citing as authority 38 U.S.C. § 2024(b)(1), which permitted reemployment following a leave of absence for active duty service other than for training, provided that the length of service was no longer than four years (with certain exceptions not relevant here). The City granted the request for extension, and then granted another two-year extension in 1983. In 1985 Paisley asked the City for a three-year extension of his leave and also asked to be permitted to take a police department promotional exam, notwithstanding that he was still on leave from the department. These requests were denied, and by letter dated December 15, 1985, Paisley resigned from the police department.

After his resignation, Paisley remained on active duty with the National Guard and was offered early retirement from the Guard in May 1994, the same time he first sought reemployment with the police department. The City denied his request for reemployment. In September 1994, Paisley took

early retirement from the National Guard with the rank of colonel and filed this lawsuit against the City. The Relief Association, opposing Paisley's lawsuit, intervened. The District Court granted summary judgment to the City and to the Relief Association, and denied Paisley's motion for summary judgment. Paisley appeals and the City and the Relief Association cross-appeal. We review de novo, Shannon v. Ford Motor Co., 72 F.3d 678, 681 (8th Cir. 1996), and now affirm.

II.

The facts of the case are not in dispute. For his only issue on appeal, Paisley argues that the District Court erred as a matter of law in determining that Paisley waived any reemployment rights he may have had under the Act when he resigned his position with the police department in 1985.

We have held that reemployment rights under the Act may be waived if the employee does so "clearly and unequivocally." Smith v. Missouri Pac. Transp. Co., 313 F.2d 676, 680 (8th Cir. 1963). We think that Paisley has done so here. He requested three two-year leaves of absence from his employment as a patrolman, and the city granted them all. As Paisley acknowledged, "There was no requirement that I serve any time or continue in the National Guard. I could have left at any time." Paisley Deposition at 19. Still, he sought a fourth extension, this time for three years, and the City said no. At that point, Paisley wrote a letter to the police department wherein he clearly stated, "I hereby tender my resignation from the Minneapolis Police Department." Letter from Duane D. Paisley to Minneapolis Police Dep't (Dec. 15, 1985). "Though I am disapointed [sic] to leave the department at this time, I am very appreciative of the support that I have been given and the opportunity I have had to accept several challenging assignments in the military." Id.

It is clear that Paisley voluntarily extended his active duty with the National Guard and that he voluntarily resigned from the police department in 1985. See Smith, 313 F.2d at 681 (observing as a factor supporting waiver "that the commitments and requests signed by the Colonel were executed voluntarily"). Moreover, there is no suggestion that Paisley did not understand his legal rights under the Act. See id. Paisley nevertheless argues that he resigned reluctantly and that he did not intend to give up any statutory employment rights that he may have had. But Paisley's waiver is not equivocal simply because the resignation was difficult for him, or even because the decision was precipitated by the police department's 1984 refusal to extend his leave or to allow him to take the promotional exam. Given the choice, he elected to make his career with the military. His efforts to maintain his police officer qualifications during his leave of absence--but **before** his resignation--do not demonstrate that the waiver was unclear or equivocal. Further, after he resigned, Paisley sought and received the pension benefits and refunds to which he was entitled as a separated police department employee, clearly indicating his understanding that he had terminated his employment and moved on to another career. He stayed with the military until he retired in 1994 with more than fourteen years of continuous active duty service. Based on the foregoing facts, we conclude that Paisley "clearly and unequivocally" waived any statutory reemployment rights he may have had and opted for a military career rather than a career with the police department.

Paisley argues that Smith is no longer good law in light of the Supreme Court's decision in King v. St. Vincent's Hospital, 502 U.S. 215 (1991). In King, the employee sought a three-year leave of absence from his employment to take a full-time appointment with the National Guard. His employer denied the request and sought a declaratory judgment that the three-year request was unreasonable and that the employee therefore

had no reemployment rights under the Act. The Supreme Court held that there was no durational limit on a leave taken under 38 U.S.C. § 2024(d), and that it would not read a "reasonableness" limit on the length of a § 2024(d) leave after which the employee would be entitled to reemployment.[3]

To the extent Smith can be read to suggest that a leave of absence for active guard duty must be of a "reasonable" length to entitle a serviceman to reemployment, we agree that it was overruled by King, at least for the brief time that King controlled the question.[4] But there was no issue of waiver in the King case, so its § 2024 (d) holding has no bearing on the question of whether a veteran may waive his reemployment rights--so long as we do not rely on the length of the employee's absence as a basis for finding a clear and unequivocal waiver.[5]

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[3] Under 38 U.S.C. § 2024(d), as relevant here, an employee who meets the service requirements of the subsection "shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States," with reemployment rights upon release. Paisley claims, and the District Court concluded (in a holding challenged here by the City and the Relief Association, see infra Part III), that Paisley satisfied the statutory requirements of § 2024(d) and properly seeks relief under that subsection of the Act.

[4] With the enactment of the 1994 amendments to the Act, which inter alia limit cumulative leaves of absence for military service to five years in order for the employee to qualify for reemployment rights, 38 U.S.C. § 4312(a)(2) (1994), the holding of King v. St. Vincent's Hospital, 502 U.S. 215 (1991), would appear to have only limited, if any, remaining practical significance in cases arising under the Act.

[5] We believe, however, that there is a legally significant distinction between an intent to take a true leave of absence from civilian employment, the length of which is not subject to a reasonableness standard, and an intent to make the military a career, which suggests a choice to forsake one's civilian job and any reemployment rights attached thereto. As this Court in Smith v. Missouri Pacific Transportation Co., 313 F.2d 676, 682-83 (8th Cir. 1963), said in

Paisley also contends that Smith is not good authority here because of later "substantive changes" to the Veterans' Reemployment Rights Act, including bringing government employers within the strictures of the Act, and the subsequent "inception of the AGR [active guard reserve] program." Brief of Appellant at 6. Paisley offers no explanation, however, as to how statutory amendments subsequent to Smith in any way call into question the applicability of the doctrine of waiver to cases of this sort. The Act does not mention waiver and we have located no cases decided since the Smith opinion was issued in 1963 that even suggest that the doctrine of waiver is inapplicable to cases arising under the Act.

We conclude that the District Court did not err in holding that Paisley has waived any reemployment rights to which he may have been entitled under the Act.

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summarizing its conclusion that the veteran had waived reemployment rights:

> To render a decision in favor of this plaintiff would be to recognize and to vest in one in his posture the power, step by step, as extension-of-duty opportunities present themselves, in effect to make a career of the service and at the same time to force his civilian employer to hold or to make a place available for him throughout the career period and until such time as he chooses to bring his military life to an end or until it is finally terminated for him because of age, physical disability, or the like.

The Smith opinion notes that "[a]ppropriate civilian reemployment protection at the end of a non-career period of service was what our national legislative body had in mind." Id. at 683. We do not read King, 502 U.S. 215, as being inconsistent with Smith.

III.

For their cross-appeals, the City and the Relief Association argue that, even had there been no waiver, Paisley does not come within § 2024(d) of the Act, and that the District Court erred in concluding otherwise. Our holding in Part II of this opinion that Paisley waived any statutory rights he may have had makes it unnecessary for us to consider the cross-appeals, and we decline to do so.

IV.

We hold that Paisley waived any reemployment rights to which he may have been entitled under the Act. Accordingly, the judgment of the District Court in favor of the City and the Relief Association is affirmed. The cross-appeals of the City and the Relief Association are dismissed, their resolution being unnecessary to proper disposition of the case.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
Civil No. 3-94-1051

Duane D. Paisley,

Plaintiff,

v.

City of Minneapolis,

ORDER

Defendant,

and

Minneapolis Police Relief Association,

Defendant Intervenor.

Harry A. Sieben, Jr., Esq., appeared on behalf of Plaintiff.
C. Lynne Fundingsland, Esq., appeared on behalf of Defendant.
Caryn S. Glover, Esq., and Frank J. Walz, Esq., appeared on behalf of Intervenor.

The above-entitled matter came on for hearing before the undersigned United States Magistrate Judge on the 1st day of February, 1995 pursuant to Cross Motions for summary judgment. See Motions, Doc. Nos. 17, 21 & 24. At the hearing, all parties agreed that no genuine issues of material

fact exist and that this action is appropriate for resolution on the Motions for summary judgment.[1]

BACKGROUND

Plaintiff, Duane D. Paisley, enlisted in the National Guard in 1965. See Paisley Depo., pp. 5, 9. From 1965 until 1980, Plaintiff was a traditional Guard member, serving one weekend a month and fifteen annual training days with the National Guard. See Paisley Depo., pp. 10, 12-13.

Plaintiff, upon joining the National Guard, went to basic training and advanced individual training. He was commissioned a Second Lieutenant, promoted to First Lieutenant in 1972, and to Captain in 1976. From 1979 to 1980, Plaintiff was the aide to the Adjutant General and, in 1980, was promoted to the rank of Major. See Paisley Depo., pp. 5-6; Paisley Depo., Ex. No. 12.

In 1973, Plaintiff began employment with Defendant, in its Police Department, as a sworn police officer. See Paisley Depo., p. 13. In 1979, Plaintiff requested a two-year leave of absence from his position with Defendant to go on active duty with the National Guard. The National Guard had offered Plaintiff this position, which he accepted. See Paisley Depo., p. 17.

In 1981, Plaintiff requested that his leave of absence be extended for an additional two years, until 1984. See Paisley Depo., 15, 22. In seeking this extension of his leave of absence, Plaintiff cited to 38 U.S.C. § 2024(b)(1), stating that

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[1] The parties consented to proceed before the undersigned on October 18, 1994 and an Order of Reference was issued by Judge Richard H. Kyle on December 9, 1994. See, Doc. No. 7. Since the parties consented to proceed before the undersigned and may appeal directly to the 8th Circuit Court of Appeals, this decision is issued as an Order rather than a Report and Recommendation.

he believed that provision entitled him to a four-year leave of absence. See Paisley Depo., p. 36; Paisley Depo. Ex. No. 5.

This additional leave of absence was granted by Defendant, and Plaintiff remained on active duty with the National Guard. See Paisley Depo., pp. 22-23; 25. Plaintiff later requested an additional leave of absence, to extend from 1984 to 1986, to remain on active duty with the National Guard. See Paisley Depo., p. 25. This request was also granted by Defendant. See Paisley Depo., p. 25.

Plaintiff could have left his active duty position with the National Guard when his initial leave of absence expired. See Paisley Depo., p. 28. Plaintiff voluntarily requested these leaves of absence so that he could remain in his position with the National Guard on full-time active duty. See Paisley Depo., p. 25. It was Plaintiff's preference to remain on active duty with the National Guard during the period of time he was on a leave of absence, rather than return to his employment with Defendant. See Paisley Depo., p. 27.

On October 18, 1985, Plaintiff requested that his leave of absence which, at that time, extended until January 15, 1986, be extended for an additional three years from that date. See Paisley Depo., Ex. No. 6. Defendant denied this request. Also in 1985, Plaintiff requested that the Defendant allow him permission to take a promotional examination for the position of police sergeant with Defendant. See Paisley Depo., Ex. No. 7. On November 15, 1985, Defendant denied this request. Id.

On December 15, 1985, Plaintiff tendered his resignation to Defendant. See Paisley Depo., Ex. No. 8. In Plaintiff's letter of resignation he wrote, "[t]his difficult decision was prompted by the recent disapproval of my request for extension of a military leave of absence to serve on active duty." Plaintiff went on to state," . . . but for the fact that I was denied the opportunity to compete in the recent Sergeants

[sic] promotional examination, my decision might have been otherwise." See Paisley Depo., Ex. No. 8.

When Plaintiff tendered his resignation to Defendant, his career plans were to continue serving on active duty with the National Guard. See Paisley Depo., pp. 39. Plaintiff tendered his resignation to Defendant knowing, at the time, that he could have returned to work with Defendant in its police department. See Paisley Depo., p. 40. After Plaintiff's resignation, Plaintiff sought, and received, the amount due him under the pension plan for Defendant's police officers. See Paisley Depo., p. 49; Paisley Depo. Exs. 9, 10.

Plaintiff remained with the National Guard on active duty continuously from 1980 until September, 1994. In 1984, he was promoted to Lieutenant Colonel, and, in 1988, was promoted to the rank of Colonel. See Paisley Depo., Ex. No. 12.

In May of 1994, Plaintiff was offered early retirement from the National Guard. See Paisley Depo., p. 7. In the officer ranks of the National Guard, there is no set retirement date. See Paisley Depo., p. 8. If a person in those ranks chooses to leave the National Guard, he or she may do so at any time. Id.

Also in May of 1994, Plaintiff first sought reemployment with Defendant. See Paisley Depo., p. 53. Plaintiff sought reemployment with Defendant at that time because he had then made a decision to leave active duty with the National Guard. See Paisley Depo., p. 53. At no time between Plaintiff's resignation from employment with Defendant (December 15, 1985), and May, 1994, did Plaintiff seek reemployment with Defendant. See Paisley Depo., p. 54.

Based upon the offer of early retirement, Plaintiff retired from the National Guard in September of 1994. See Paisley Depo., pp. 6, 53-54. Plaintiff began receiving a pension based upon his military service at the time he retired from the National Guard. See Paisley Depo., p. 7.

On September 1, 1994, Plaintiff initiated the instant action, seeking monetary compensation for accumulated sick leave, vacation time, and pension benefits from January 16, 1980, to date and continuing. Plaintiff also seeks a declaration of his right to reemployment with Defendant and, in this action, relies upon the provisions of 38 U.S.C. § 2024(d) to support his claims.

DISCUSSION

I. STANDARD FOR SUMMARY JUDGMENT.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall he rendered if there exists no genuine issue as to any material fact. Summary judgment is appropriate once the moving party shows the absence of any material fact.

The United States Supreme Court, in construing Federal Rule 56(c), stated in Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-2553 (1986):

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

To prevail on a motion for summary judgment, the moving party does not need to negate the existence of every fact in dispute. Celotex Corp. v. Catrett, supra. See also, Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 585 (8th Cir. 1987). Opponents of summary judgment must point out "specific facts showing that

there is a genuine issue for trial." Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 106 S.Ct. 1348, 1356 (1986). Hearsay, speculation, and unsworn materials will be disregarded in evaluating objections to summary judgment. Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981). Evidence offered to defeat summary judgment must be admissible at trial, or indicate the existence of admissible evidence. Matsushita, supra. The admissible evidence must support a reasonable jury finding for the non-moving party. Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986).

II. PLAINTIFF FALLS UNDER 38 U.S.C. § 2024(D).

Plaintiff claims to be entitled to certain reemployment rights under the Veterans' Reemployment Rights Act, specifically 38 U.S.C. § 2024(d).[2] In order to receive the benefits of reemployment rights, Plaintiff bears the burden of proving that he has "satisfied the statutory requirements and is entitled to receive reemployment rights." Shadle v. Superwood Corp., 858 F.2d 437, 439 (8th Cir. 1988).

38 U.S.C. § 2024(d) provides in relevant part that:

> Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces

[2] The Veterans' Reemployment Rights Act was formerly codified at 38 U.S.C. § 2021 et seq. and this action was pled under the former numbering scheme. The Act is now codified at 38 U.S.C. § 4301 et seq. Since the action was pled under the prior numbering scheme and all parties cited to that scheme, this Court will also employ the former numbering scheme throughout its analysis.

> of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

Defendant and Defendant Intervenor contend that Plaintiff does not fall under this section because he cannot establish that he was performing active duty for training or inactive duty training. Instead, they allege that he falls under 38 U.S.C. § 2024(b), which contains an explicit four-year durational limit, thus preventing Plaintiff from recovering.

However, Defendant's claim must fail because Plaintiff's Active Guard/Reserve (AGR) service has been statutorily deemed "active duty for training." See 38 U.S.C. § 2024(f). 38 U.S.C. § 2024(f) provides that:

> For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504 or 505 of title 32 is considered active duty for training.

Plaintiff's service in the AGR program was performed under the authority of 32 U.S.C. § 502(f). See Fundingsland Aff., Ex. B. Consequently, the presence or absence of any actual training component is immaterial because Congress has extended the protections of § 2024(d) to those serving in the AGR program pursuant to 32 U.S.C. § 502(f).

In addition, the District Court, in King v. St. Vincent's Hospital, 112 S.Ct. 570 (1991), faced with the identical issue also determined that AGR service pursuant to 32 U.S.C. § 502(f) is considered "active duty for training" for purposes of

coverage under 38 U.S.C. § 2024(d). King v. St. Vincent's Hospital, 1989 WL 91134, *4, n.8. Moreover, the Solicitor General in his brief to the Supreme Court for the petitioner in the King case, relied on by Defendant, noted the identical relationship between AGR service under 32 U.S.C. § 502(f) and coverage under 38 U.S.C. § 2024(d). See Brief for Petitioner, 1991 WL 521591, ** 8, 9, and 35.

It is thus apparent that Plaintiff properly alleges reemployment coverage under 38 U.S.C. § 2024(d). His AGR service pursuant to 32 U.S.C. § 502(f) has been statutorily deemed "active duty for training." See 38 U.S.C. § 2024(f).

III. PLAINTIFF WAIVED HIS RIGHTS TO REEMPLOYMENT.

Since Plaintiff's reemployment rights are governed by 38 U.S.C. § 2024(d), this Court must look to the breadth of those rights as interpreted recently by the Supreme Court in the King case. In King, the plaintiff accepted a full-time AGR position under 32 U.S.C. § 502(f) with a three-year term. His employer, St. Vincent's Hospital, rejected his request for a leave of absence and brought a declaratory judgment action in the United States District Court for the District of Northern Alabama to determine whether § 2024(d) provided reemployment rights after terms as long as the plaintiff's. King, 112 S.Ct. at 572. Following Eleventh Circuit precedent which had grafted a reasonableness requirement onto § 2024(d), the District Court determined that Plaintiff's request for a three-year leave of absence was per se unreasonable. A panel of the Eleventh Circuit affirmed. See King, 901 F.2d 1068 (1990). Finally, the Supreme Court reversed. It determined, through interpreting the statute, that § 2024(d)'s lack of a durational limit was a deliberate choice by Congress to provide its protection without imposing a length of service condition. King, 112 S.Ct. at 574. Thus, "§ 2024(d) places

no limit on the length of a tour after which [a plaintiff] may enforce his reemployment rights against [a defendant]." Id., 112 S.Ct. at 575.

However, an issue not before and not touched upon by the Supreme Court in King is the issue of waiver. Veterans may waive their reemployment rights if they do so clearly and unequivocally. Wright v. Ford Motor Co., 196 F.Supp. 538, 540 (E.D.Mich. 1961); Niemiec v. Seattle Rainier Baseball Club, 67 F.Supp. 705, 709 (W.D.Wash. 1946). Plaintiff's decision to pursue a military career rather than a career with the Minneapolis Police Department constitutes such a waiver.

In Smith V. Missouri Pacific Transportation Co., 313 F.2d 676 (8th Cir. 1963), the plaintiff served nearly eleven continuous years in the military before he sought reemployment from his civilian employer. While in the military, the plaintiff voluntarily sought and received extensions of his commitments which allowed his prolonged stay in the service and facilitated his rise to the rank of Colonel. Id. 313 F.2d at 678. Several months after attaining the age of sixty, the plaintiff was released from the military and sought reemployment with his civilian employer. Id. After his request was denied, he brought suit in federal court under 50 U.S.C.App. § 459 (g)[3] and, in the alternative, under § 8 of the Selective Training and Service Act of 1940.[4]

The 8th Circuit Court of Appeals affirmed the District Court's determination that the plaintiff had waived any reemployment rights he had through choosing to pursue a military career, rather than a civilian one. Id. 313 F.2d at 682.

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[3] 38 U.S.C. § 2024(d) is a recodification of 50 U.S.C.App. § 459(g). Lemmon v. Santa Cruz County, Cal., 686 F.Supp. 797, 803 n.9 (N.D.Cal. 1988).

[4] The 1940 Act assured reemployment for an indefinite term. However, the Court in Smith determined that waiver of rights was still possible. Smith, 313 F.2d at 682.

In reaching his conclusion, then 8th Circuit Court of Appeals Judge Harry A. Blackmun, wrote that:

> In summary, we feel that the plaintiff's claim of protection under the facts of this case asserts too much and goes too far. To render a decision in favor of this plaintiff would be to recognize and to vest in one in his posture the power, step by step, as extension-of-duty opportunities present themselves, in effect to make a career of the service and at the same time to force his civilian employer to hold or to make a place available for him throughout the career period and until such time as he chooses to bring his military life to an end or until it is finally terminated for him because of age, physical disability, or the like. This, we think, was not the intent of Congress. Appropriate civilian reemployment protection at the end of a non-career period of service was what our national legislative body had in mind.

Id., 313 F.2d at 682-683.

Similarly, in Dahl v. Minneapolis Police Relief Association, Inc., 187 N.W.2d 671 (Minn. 1971), the Minnesota Supreme Court confronted with an analogous case reached the same result. In that case, the plaintiff became employed by the Minneapolis Police Department in February 1942. Id. One month later, he enlisted in the Army Air Force and served for approximately three and a half years. Id. He then returned to the police force and worked from 1945 until January 1951, when his Minnesota Air National Guard unit was called to active duty in the Korean conflict. Id. He served on active duty with the military until April 1967 when he was discharged with a twenty-year military pension. The plaintiff could have had a discharge in 1956, but instead chose to continue his military service until his 1967 discharge. Id.,

187 N.W.2d at 672. The plaintiff then returned to the police force for several months in the latter part of 1967, before he retired and sought a twenty-year police pension. The defendant denied his request and he brought a declaratory judgment action in state court. Id. The district court denied relief, he appealed and the Minnesota Supreme Court affirmed. Id.

Relying on the Smith case, the Minnesota Supreme Court determined that the plaintiff had impliedly waived any claim for pension credit for his military service after the time he could have been discharged. Id., 187 N.W.2d at 674. The Court found the plaintiff's claim to be absurd and unreasonable because:

> [i]f plaintiff's position were correct, it would be possible for a policeman to become employed by the department, work for 1 day and then go into military service, come back to his job 1 day after the 20 years of military service and qualify for a pension.

Id., 187 N.W.2d at 673.

In the present case, Plaintiff sought and received three military leaves of absence to pursue active duty in the AGR program. Upon applying for a further extension of his leave, he was denied. He could have returned to the Minneapolis Police Department but instead chose to continue to engage in his military career. In addition, he sought and received all the benefits and refunds from the police pension fund to which he was entitled. He continued his military service until eventually he took early retirement in 1994 after more than fourteen years of continuous active duty status in the National Guard.

While it is clear from Plaintiff's December 1985 resignation letter that it was a "difficult decision" for him, it is apparent that Plaintiff chose a military rather than a civilian career and that his claim "asserts too much and goes too far."

Smith, 313 F.2d at 682. Accordingly, his conduct constitutes a waiver of his reemployment rights and Plaintiff's claim must fail.[5] See Smith, supra; and Dahl, supra.

IV. PLAINTIFF'S BREACH OF CONTRACT CLAIM IS TIME BARRED.

Plaintiff's breach of contract claim against Defendant is controlled by one of two potentially applicable statutes of limitations. See Minn. Stat. §§ 541.07(5) and 541.05 subd. 1(2). If Plaintiff's claim is construed as a contract action against Defendant for failing to follow its personnel policies, then a two-year statue of limitations would govern. See Minn. Stat. § 541.07(5) and Portlance v. Golden Valley State Bank, 405 N.W.2d 240 (Minn. 1987). If Plaintiff's claim is interpreted as a statutory claim, then a six-year limitations period would apply. See Minn. Stat. § 541.05 subd. 1(2) and Rice v. Target Stores, Div. of Dayton Hudson Corp., 677 F.Supp. 608 (D.Minn. 1988).

Plaintiff's request to sit for Defendant's promotional exam was denied in November 1985. He did not institute this action until September 1, 1994. Since nearly nine years elapsed between the denial of his request and the commencement of this action, his claim is barred by either of the two statutes of limitations which potentially control and it is not necessary for this Court to determine which is the applicable limitations

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[5] Plaintiff also asserts claims under Minn. Stat. § 192.26 et seq. Minn. Stat. § 192.261 subd. 5(b) is modeled after and nearly identical to 38 U.S.C. § 2024(d). In fact, it even references U.S.C. Title 38 for the meaning of "active duty for training" and "inactive duty for training." Minn. Stat. § 192.261 subd. 5(b). The Minnesota statute does not differ from § 2024(d) in any material way and the analysis applied to § 2024(d) would be equally germane to Minn. Stat. § 192.261 subd. 5(b). Thus, through his conduct, Plaintiff has waived any reemployment rights he had under the Minnesota Statutes.

period. Consequently, summary judgment in favor of Defendant and Defendant Intervenor is appropriate as to Plaintiff's breach of contract claim.

Accordingly, based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY ORDERED that:

1) Plaintiff's Motion for summary judgment (Doc. No 17) is **DENIED**; and

2) Defendant's and Defendant Intervenor's Motions for summary judgment (Doc. Nos. 24 & 21) are **GRANTED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/
ANN D. MONTGOMERY
UNITED STATES
MAGISTRATE JUDGE

Dated: 3/31/95

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-2084/2175/2177MNST

Duane D. Pailey,	*	
	*	
Appellant/Cross-Appellee,	*	
	*	
v.	*	
	*	Order Denying Petition for
City of Minneapolis, et al.,	*	Rehearing and Suggestion
	*	for Rehearing En Banc
Appellee/Cross-Appellant.	*	

The suggestion for rehearing en banc is denied. The petition fox rehearing by the panel is also denied.

May 10, 1996

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

28 U.S.C. § 1254

32 U.S.C. § 502

38 U.S.C. § [4321] 2021

38 U.S.C. § [4322] 2022

38 U.S.C. § [4323] 2023

38 U.S.C. § [4324] 2024

38 U.S.C. § [4325] 2025

38 U.S.C. § [4326] 2026

38 U.S.C. § [4327] 2027

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, ch 646, § 1, 62 Stat. 928; June 27, 1988, P. L. 100-352, § 2(a), (b), 102 Stat. 662.)

§ 502. Required drills and field exercises

(a) Under regulations to be prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, each company, battery, squadron, and detachment of the National Guard, unless excused by the Secretary concerned, shall—

(1) assemble for drill and instruction, including indoor target practice, at least 48 times each year; and

(2) Participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year.

However, no member of such unit who has served on active duty for one year or longer shall be required to participate in such training if the first day of such training period falls during the last one hundred and twenty days of his required membership in the National Guard.

(b) An assembly for drill and instruction may consist of a single ordered formation of a company, battery, squadron, or detachment, or, when authorized by the Secretary concerned, a series of ordered formations of parts of those organizations. However, to have a series of formations credited as an assembly for drill and instruction, all parts of the unit must be included in the series within 30 consecutive days.

(c) The total attendance at the series of formations constituting an assembly shall be counted as the attendance at that assembly for the required period. No member may be counted more than once or receive credit for more than one required period of attendance, regardless of the number of formations that he attends during the series constituting the assembly for the required period.

(d) No organization may receive credit for an assembly for drill or indoor target practice unless-

(1) the number of members present equals or exceeds the minimum number prescribed by the President;

(2) the period of military duty or instruction for which a member is credited is at least one and one-half hours; and

(3) the training is of the type prescribed by the Secretary concerned.

(e) An appropriately rated member of the National Guard who performs an aerial flight under competent orders may receive credit for attending drill for the purposes of this section, if the flight prevented him from attending a regularly scheduled drill.

(f) Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—

(1) without his consent, but with the pay and allowances provided by law; or

(2) with his consent, either with or without pay and allowances;

be ordered to perform training or other duty in addition to that prescribed under subsection (a). Duty without pay shall be considered for all purposes as if it were duty with pay.

(Aug. 10, 1956, ch 1041, § 2, 70A Stat. 610; Oct. 3, 1964, P. L. 88-621, § 1(1), 78 Stat. 999; Dec. 1, 1967, P. L. 90-168, § 4, 81 Stat. 526; Nov. 17, 1971, P. L. 92-156, Title III, § 303(b), 85 Stat. 425.)

§ [4321] 2021. Right to reemployment of inducted persons; benefits protected

(a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

(A) if such position was in the employ of the United States Government, its territories, or possessions, or political subdivisions thereof, or the District of Columbia, such person shall—

(i) if still qualified to perform the duties of such position, be restored to such position or able to become requalified with reasonable efforts by the employer duties of such position or to a position of he seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position, by reason of disability sustained during such service, but qualified to perform the duties or able to become requalified with reasonable efforts by the employer of any other position in the employ of the employer, be offered employment and, if such person so requests, be employed in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case;

(B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—

(i) if still qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position or able to become requalified with reasonable efforts by the employer, by reason of disability sustained during such service, but qualified to perform the duties of any other position in the employ of such employer or the employer's successor in interest. be offered employment and, if such person so requests, be employed by such employer or the employer's successor in interest in such other position the duties of which such person is qualified to perform as will provide such person like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such person's case,

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so. Nothing in this chapter [38 USCS 66 2021 [4321] et seq.] shall excuse noncompliance with any statute or ordinance of a State or political subdivision thereof establishing greater or additional rights or protections than the rights and protections established pursuant to this chapter [38 USCS §§ 2021 [4321] et seq.].

(b)(1)(A) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such person's period of training and service in the Armed Forces, shall be so restored or

reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be dischared from such position without cause within one year after such restoration or reemployment.

(B) In the case of employer-offered health insurance, an exclusion or waiting period may not be imposed in connection with coverage of a health or physical condition of a person entitled to participate in that insurance under subparagraph (A), or a health or physical condition of any other person who is covered by the insurance by reason of the coverage of such person, if—

(i) the condition arose before or during that person's period of training or service in the Armed Forces;

(ii) an exclusion or waiting period would not have been imposed for the condition during a period of coverage resulting from participation by such person in the insurance; and

(iii) the condition of such person has not been determined by the Secretary to be service-connected.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in the person's employment as the person would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

(3) Any person who seeks or holds a position described in clause (A) or (B) of subsection (a) of this section shall not

be denied hiring, retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

(c) The rights granted by subsections (a) and (b) of this section to persons who left the employ of a State or political subdivision thereof and were inducted into the Armed Forces shall not diminish any rights such persons may have pursuant to any statute or ordinance of such State or political subdivision establishing greater or additional rights or protections.

(Added Dec. 3, 1974, P. L. 93-508, Title IV, § 404(a), 88 Stat. 1594; Oct. 15, 1976, P. L. 94-502, Title VI, § 608(1), (2), 90 Stat. 2405; Oct. 28, 1986, P. L. 99-576, Title 111, Part A, § 331, 100 Stat. 3279; March 18, 1991, P. L. 102-12, § 5(a), 105 Stat. 36; April 6, 1991, P. L. 102-25, Title III, Part C, § 340, 105 Stat. 92.)

§ [4322] 2022. Enforcement procedures

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section 2021 (a), (b)(1), or (b)(3), or 2024 of this title [38 USCS § 2021 [4321] (a), (b)(1), or (b)(3) or 2024 [4324]], the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary party respondent. No State statute of limitations shall apply to any proceedings under this chapter [38 USCS §§ 2021[4321] et seq.].

(Added Dec. 3, 1974, P. L. 93-508, Title IV, §404(a), 88 Stat. 1596; Oct. 12, 1982, P. L. 97-295, § 4(71), 96 Stat. 13 10; Nov. 8, 1984, P. L. 98-620, Title IV, Subtitle A, § 402(36), 98 Stat. 3060.)

§ [4323] 2023. Reemployment by the United States, territory, possession, or the District of Columbia

(a) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021 (a) [38 USCS § 2021 [4321] (a)(A)] and who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by any territory or possession, or political subdivision thereof, or by the District of Columbia, shall be so restored or reemployed by such agency or the successor to its functions, or by such territory, possession, political subdivision, or the District of Columbia. In any case in which, upon appeal of any person who was employed, immediately before entering the Armed Forces, by any agency in the executive branch of the Government or by the District of Columbia, the Director of the Office of Personnel Management finds that—

(1) such agency is no longer in existence and its functions have not been transferred to any other agency; or

(2) for any reason it is not feasible for such person to be restored to employment by such agency or by the District of Columbia;

the Director shall determine whether or not there is a position in any other agency in the executive branch of the Government or in the government of the District of Columbia for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Director determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists or by the government of the District of Columbia, as the case may be. The Director is authorized and directed to issue regulations giving full force and effect to the provisions of this section insofar as they relate to persons entitled to be restored to or employed in positions in the

executive branch of the Government or in the government of the District of Columbia, including persons entitled to be reemployed under the last sentence of subsection (b) of this section. The agencies in the executive branch of the Government and the government of the District of Columbia shall comply with such rules, regulations, and orders issued by the Director pursuant to this subsection. The Director is authorized and directed when the Director finds, upon appeal of the person concerned, that any agency in the executive branch of the Government or the government of the District of Columbia has failed or refuses to comply with the provisions of this section, to issue an order specifically requiring such agency or the government of the District of Columbia to comply with such provisions and to compensate such person for any loss of salary or wages suffered by reason of failure to comply with such provisions, less any amounts received by such person through other employment, unemployment compensation, or readjustment allowances. Any such compensation ordered to be paid by the Director shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions, and shall be paid by the head of the agency concerned or by the government of the District of Columbia out of appropriations currently available for salary and expenses of such agency or government, and such appropriations shall be available for such purpose. As used in this chapter [38 USCS §§ 2021 [4321] et seq.], the term "agency in the executive branch of the Government" means any department, independent establishment, agency, or corporation in the executive branch of the United States Government (including the United States Postal Service and the Postal Rate Commission).

(b) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 202 1 (a) of this title [38 USCS § 2021 [4321] (a)(A)], and who was employed, immediately before entering the

Armed Forces, in the legislative branch of the Government, shall be so restored or employed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces. In any case in which it is not possible for any such person to be restored to or employed in a position in the legislative branch of the Government and such person is otherwise eligible to acquire a status for transfer to a position in the competitive service in accordance with section 3304(c) of title 5 [5 USCS § 3304(c)], the Director of Office of Personnel Management shall, upon appeal of such person, determine whether or not there is a position in the executive branch of the Government for which such person is qualified and which is either vacant or held by a person having a temporary appointment thereto. In any case in which the Director determines that there is such a position, such person shall be offered employment and, if such person so requests, be employed in such position by the agency in which such position exists.

(c) Any person who is entitled to be restored to or employed in a position in accordance with the provisions of clause (A) of section 2021(a) of this title [38 USCS § 2021 [4321] (a)(A)] and who was employed, immediately before entering the Armed Forces, in the judicial branch of the Government, shall be so restored or reemployed by the officer who appointed such person to the position which such person held immediately before entering the Armed Forces.

(Added Dec. 3, 1974, P. L. 93-508, Title IV, § 404(a), 88 Stat. 1596; Oct. 12, 1982, P. L. 97-295, § 4(72), 96 Stat. 1310.)

§ [4324] 2024. Rights of persons who enlist or are called to active duty; Reserves

(a) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enlists in the Armed Forces of the United States (other than in a Reserve component) shall be entitled upon release from service under honorable conditions to all of the reemployment rights and other benefits provided for by this chapter [38 USCS §§ 2021 [4321] et seq.] in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of such person's service performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any service, additional or otherwise, performed by such person after August 1, 1961, does not exceed five years, and if the service in excess of four fears after August 1, 1961, is at the request and for the convenience of the Federal Government (plus in each case any period of additional service imposed pursuant to law).

(b)(1) Any person who, after entering the employment on the basis of which such person claims restoration or reemployment, enters upon active duty (other than for the purpose of determining physical fitness and other than for training), whether or not voluntarily, in the Armed Forces of the United States or the Public Health Service in response to an order or call to active duty shall, upon such person's relief from active duty under honorable conditions, be entitled to all of the reemployment rights and benefits provided for by this chapter [38 USCS §§ 2621 [4321] et seq.] in the case of persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), if the total of

such active duty performed between June 24, 1948, and August 1, 1961, did not exceed four years, and the total of any such active duty, additional or otherwise, performed after August 1, 1961, does not exceed four years (plus in each case any additional period in which such person was unable to obtain orders relieving such person from active duty).

(2) Any member of a Reserve component of the Armed Forces of the United States who voluntarily or involuntarily enters upon active duty (other than for the purpose of determining physical fitness and other than for training) or whose active duty is voluntarily or involuntarily extended during a period when the President is authorized to order units of the Ready Reserve or members of a Reserve component to active duty shall have the service limitation governing eligibility for reemployment rights under subsection (b)(1) of this section extended by such member's period of such active duty, but not to exceed that period of active duty to which the President is authorized to order units of the Ready Reserve or members of a Reserve component. With respect to a member who voluntarily enters upon active duty or whose active duty is voluntarily extended, the provisions of this subsection shall apply only when such additional active duty is at the request and for the convenience of the Federal Government.

(c) Any member of a Reserve component of the Armed Forces of the United States who is ordered to an initial period of active duty for training of not less than twelve consecutive weeks shall, upon application for reemployment within thirty-one days after (1) such member's release from such active duty for training after satisfactory service, or (2) such member's discharge from hospitalization incident to such active duty for training, or one year after such member's scheduled release from such training, whichever is earlier, be entitled to all reemployment rights and benefits provided by this chapter [38

USCS §§ 2021 [4321] et seq.] for persons inducted under the provisions of the Military Selective Service Act (or prior or subsequent legislation providing for the involuntary induction of persons into the Armed Forces), except that (A) any person restored to or employed in a position in accordance with the provisions of this subsection shall not be discharged from such position without cause within six months after that restoration, and (B) no reemployment rights granted by this subsection shall entitle any person to retention, preference, or displacement rights over any veteran with a superior claim under those provisions of title 5 [5 USCS §§ 101 et seq.] relating to veterans and other preference eligibles.

(d) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021 (a) [38 USCS § 2021 [4321] (a)(A),(B)] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes. Such employee shall report for work at the beginning of the next regularly scheduled working period after expiration of the last calendar day necessary to travel from the place of training to the place of employment following such employee's release, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control. Failure to report for work at such next regularly scheduled working period shall make the employee subject to the conduct rules of the employer pertaining to explanations and discipline with respect to absence from scheduled work. If such an employee is

hospitalized incident to active duty for training or inactive duty training, such employee shall be required to report for work at the beginning of the next regularly scheduled work period after expiration of the time necessary to travel from the place of discharge from hospitalization to the place of employment, or within a reasonable time thereafter if delayed return is due to factors beyond the employee's control, or within one year after such employee's release from active duty for training or inactive duty training, whichever is earlier. If an employee covered by this subsection is not qualified to perform the duties of such employee's position by reason of disability sustained during active duty for training or inactive duty training, but is qualified to perform the duties of any other position in the employ of the employer or such employer's successor in interest, such employee shall be offered employment and, if such person so requests, be employed by that employer or such employer's successor in interest in such other position the duties of which such employee is qualified to perform as will provide such employee like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in such employee's case.

(e) Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021 (a) [38 USCS § 2021 [4321] (a)(A),(B)] shall be considered as having been on leave of absence during the period required to report for the purpose of being inducted into, entering, or determining, by a preinduction or other examination, physical fitness to enter the Armed Forces. Upon such employee's rejection, upon completion of such employee's preinduction or other examination, or upon such employee's discharge from hospitalization incident to such rejection or examination, such employee shall be permitted to return to such employee's position in accordance with the provisions of subsection (d) of this section.

(f) For the purposes of subsections (c) and (d) of this section, full-time training or other full-time duty performed by a member of the National Guard under section 316, 502, 503, 504, or 505 of title 32 is considered active duty for training. For the purposes of subsection (d) of this section, inactive duty training performed by that member under section 502 of title 32 or section 206, 301, 309, 402, or 1002 of title 37 is considered inactive duty training.

(g) Any member of a Reserve component of the Armed Forces of the United States who is ordered to active duty (other than for training) under section 673b of title 10, United States Code, whether or not voluntarily, shall be entitled to all reemployment rights and benefits provided under subsection (c) of this section for persons ordered to an initial period of active duty for training of not less than twelve consecutive weeks; and shall have the service limitation governing eligibility for reemployment rights under subsections (a) and (b)(1) of this section extended by his period of such active duty.

(Added Dec. 3, 1974, P. L. 93-508, Title IV, § 404(a), 88 Stat. 1598; May 14, 1976, P. L. 94-286, § 2, 90 Stat. 518; Oct. 15, 1976, P. L. 94-502, Title VI, § 608(3), 90 Stat. 2405; Oct. 17, 1980, P.L. 96-466, Title V, § 511, 94 Stat. 2207; Oct. 28, 1986, P. L. 99-576, Title VII, § 701(60), 100 Stat. 3296; March 18, 1991, P. L. 102-12, § 8(a)(1), (b)(1), 105 Stat. 38.)

§ [4325] 2025. Assistance in obtaining reemployment

The Secretary of Labor, through the Office of Veterans' Reemployment Rights, shall render aid in the replacement in their former positions or reemployment of persons who have satisfactorily completed any period of active duty in the Armed Forces or the Public Health Service. In rendering such aid, the Secretary shall use existing Federal and State agencies engaged in similar or related activities and shall utilize the assistance of volunteers.
(Added Dec. 3, 1974, P. L. 93-508, Title IV, § 404(a), 88 Stat. 1600.)

§ [4326] 2026. Prior rights for reemployment

In any case in which two or more persons who are entitled to be restored to or employed in a position under the provisions of this chapter [38 USCS §§ 2021 [4321] et seq.] or of any other law relating to similar reemployment benefits left the same position in order to enter the Armed Forces, the person who left such position first shall have the prior right to be restored thereto or reemployed on the basis thereof, without prejudice to the reemployment rights of the other person or persons to be restored or reemployed.
(Added Dec. 3, 1974, P. L. 93-508, Title IV, § 404(a), 88 Stat. 1600.)

§ [4327] 2027. Qualification for employment position

(a) For the purposes of this chapter [38 USCS §§ 2021 [4321] et seq.], a person shall be considered qualified to perform the duties of an employment position if such person, with or without reasonable accommodation, can perform the essential functions of the position.

(b) For the purposes of subsection (a) of this section, an employer shall be required to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such employer.

(c) For purposes of subsections (a) and (b) of this section—

(1) the term "employer" means—

(A) until July 26, 1994, a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person; and

(B) on and after July 26, 1994, a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person;

except that such term does not include the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986 [26 USCS § 501(c)]; and (2) the terms "reasonable accommodation" and "undue hardship" have the meanings given such terms in paragraphs (9) and

(10), respectively, of section 101 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(9) and (10)).

(d) Nothing in this chapter [38 USCS §§ 2021 [4321] et seq.] shall be interpreted to limit in any way any of the rights conferred by the Americans with Disabilities Act of 1990.

(Added April 6, 1991, P. L. 102-25, Title III, Part C, § 339(a), 105 Stat. 91.)

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

THIRD DIVISION

Court File No. 3-94-1051

Duane D. Paisley,

Plaintiff,

vs. **AFFIDAVIT OF DUANE D. PAISLEY**

City of Minneapolis,

Defendant.

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

Duane D. Paisley, being duly sworn under oath, states and deposes as follows:

1. That, he is the Plaintiff in the within matter and a resident of Ramsey County and was employed in a permanent position as a police officer with the City of Minneapolis from early June, 1973 until January 16, 1980.

2. That, Affiant had enlisted in the National Guard on June 9, 1965, prior to his employment with the City of Minneapolis.

3. That, during Affiant's employment with the City of Minneapolis, on November 1, 1979, and continuously

thereafter, Plaintiff's military status was "Active Guard/Reserve" or AGR, at a time when his salary with the City of Minneapolis, was $22,141.50.

4. That, the City of Minneapolis is a municipal employer subject to 38 U.S.C. §2024(d).

5. That, affiant is a person entitled to veterans' re-employment rights, and specifically to re-employment as a police officer with the City of Minneapolis without limitation as to time under King v. St. Vincent Hospital, 112 S.Ct. 570, 575 (1991).

6. That, the applicable employee handbook for the City of Minneapolis provided at page 22 that:

> As authorized by State Law, you are entitled to leave without pay during military service and to reinstate to your position when you return. During military leave you continue to earn sick leave, vacation time pension and seniority rights as if you were actually working . . . .

(Exhibit 1 attached).

7. That, your affiant was afforded military leaves of absence from the City of Minneapolis during which time he performed active duty under the authority of 32 U.S.C. §502(f).

8. That, on October 17, 1979, the City of Minneapolis indicated in writing that Affiant would be eligible to compete for future promotional exams. On November 15, 1985, he wrote the City of Minneapolis requesting to take a promotional exam, but the City denied the request of Affiant to take the Sergeant's examination.

9. That, on November 20, 1985, Affiant wrote to the City of Minneapolis requesting reconsideration (Exhibit 2), but to no avail. The inability of your Affiant to sit for examinations deprived or impaired his ability to achieve the

status he otherwise would have been capable of achieving with his civilian employer.

10. That, on October 18, 1985, Affiant requested a leave of absence from the Minneapolis Police Department for a period of three years, beginning after January 15, 1986 (Exhibit 3), but the City denied the request.

11. That, on December 15, 1985, Affiant wrote to tender his resignation to the City of Minneapolis due to their denial of his request for an extension of a military leave of absence, and their refusal of his ability to take the promotional examination (Exhibit 4).

12. That, Affiant is a duly licensed and certified police officer.

13. That, the Affiant met with Police Chief John Laux on April 27, 1994 to request re-employment. Subsequently, through his attorney, he requested to be reemployed on May 6, 1994 and July 15, 1994.

14. That, the Affiant has been released from active duty and honorably separated, effective August 31, 1994, and has sought to be re-employed with the City of Minneapolis, in accordance with 38 U.S.C. §[4324]2024(d), without success. (Exhibit 5)

15. That, the Affiant, having had frequent contact with the Minneapolis Police Department in his professional duties as Military Support to Civilian Authorities Officer, and having maintained professional contacts with his contemporaries within the Department, and further based upon his qualifications and abilities, believes that he should be reemployed, in accordance with the "escalator principle", in the rank of Captain.

FURTHER YOUR AFFIANT SAITH NOT.

/s/
Duane D. Paisley

Subscribed and sworn to before me this
3rd day of Jan., 1995.

s/ Sharon K. Parriott
Notary Public

EXHIBIT "1"

EMPLOYEE
HANDBOOK

MINNEAPOLIS
CITY OF LAKES

CIVIL SERVICE COMMISSION
PERSONNEL DEPARTMENT
312 3rd Avenue South
Minneapolis, Minnesota 55415

MINNEAPOLIS
City of Lakes

January, 1978

This booklet has been prepared to give you general Information about the conditions of employment with the City. It may direct you to more detailed sources of information. If you should require them. It is not an official rule book nor a legal document.

The staff of the Civil Service Office is always prepared to answer any questions that you may have and to help you in many other ways.

We hope that your employment with the City is a satisfying and productive experience and that this handbook will be of genuine assistance to you in your career.

/s/
Brian R. Isaacson
Personnel Director

Death in the Immediate Family: Three days paid leave may be granted. In addition to "immediate family" as defined above. this includes parents-in-law, grandparents, and step-parents.

Jury Service: Paid leave is allowed for jury service when fees received are paid to your department.

Military Service: Fifteen calendar days military reserve duty qualifies for paid leave.

Without Pay

Illness: Employees who have exhausted all available sick leave time may be allowed leave without pay for up to one year if needed.

Education: Formal study which is closely related to the employee's duties may be allowed.

Travel: No more than one leave of 90 days or less is permitted in any five-year period.

Maternity: Maternity leaves without pay will be granted to females in the classified service for up to six months with no loss of job rights. In certain circumstances such leave may be extended to a year. See your supervisor or personnel officer for details.

Military: As authorized by State Law, you are entitled to leave without pay during military service and to reinstatement to your position when you return. During military leave you continue to earn sick leave, vacation time, pension and seniority rights as if you were actually working; however, you do not get credit for "experience" you would have gained in your job had you not been on military leave, unless the military service duties were comparable to your job with the City.

Other: Employees may be granted leave to become a candidate for or accept public office, to take an appointive position with the City, to become business agent for a union which primarily represents City employees, and for other

reasons which the Commission feels are not prejudicial to the interests of the City.

EXHIBIT "2"

DUANE D PAISLEY
3151 BENJAMIN ST. N. E.
MINNEAPOLIS, MINN. 55418

20 November 1985

Mr. Brian Issacson
Personnel Director
Personnel Department
Civil Service Commission
City of Minneapolis
312 3rd Avenue South
Minneapolis, MN 55415

Dear Mr. Issacson:

I am in receipt of your letter of November 15, 1985 wherein you have communicated the Civil Service Commission's denial of my request to take the Police Sergeant examination #13439. It is not evident to me upon what basis my request has been denied. I sought to take the examination in reliance upon your assurance, in your letter of October 17, 1979, a copy of which I have enclosed. that I would be elgible to compete in future promotional exams. In view of this, I respectfully request that this decision be reconsidered and renew my request to take the examination.

Sincerly,

/s/
DUANE D. PAISLEY

EXHIBIT "3"

DUANE D PAISLEY
3151 BENJAMIN ST. N. E.
MINNEAPOLIS, MINN. 55418

18 October 1985

Mr. Brian Issacson
Personnel Director
Personnel Department
Civil Service Commission
City of Minneapolis
312 3rd Avenue South
Minneapolis, MN 55415

Re: Request for Continued Military Leave

Dear Mr. Issacson:

I am serving as a Commissioned Officer of the Minnesota Army National Guard on active duty under terms of a Military leave of absence from the Minneapolis Police Department. This leave extends to January 15, 1986. I respectfully request that this leave be extended for a period of three years from that date.

I have and will continue, to pursue courses of continuing education for the purpose of maintaining my Police Officers Standards and Training licence. An extension of my leave of absence will permit me to advance the important work of the Minnesota Military Academy where I am a Lieutenant Colonel, and the Training Administrator. It will also offer a Battalion level Command. These opportunities for leadership and service to our Community, State, and Nation are

consistent with and complement the duties and responsibilites I am sworn to uphold as a Police Officer.

Thank you for your consideration in this regard.

Very truly yours,
/s/
Duane D. Paisley

EXHIBIT "4"

DUANE D PAISLEY
3151 BENJAMIN ST. N. E.
MINNEAPOLIS, MINN. 55418

Minneapolis Police Department
Attention: Personnel
Room 210½
City Hall
Minneapolis, MN 55415

15 December 1985

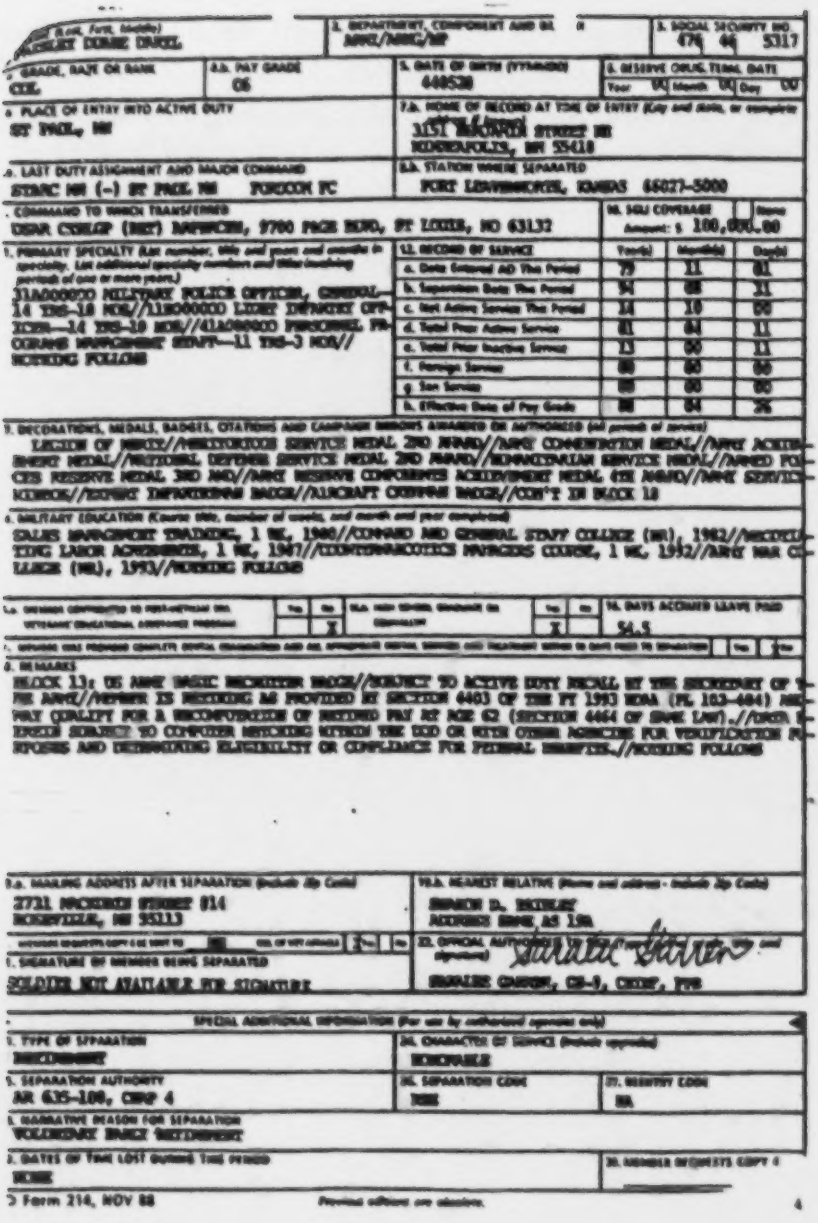
I hereby tender my resignation from the Minneapolis Police Department. This difficult decision was prompted by the recent disapproval of my request for extension of a military leave of absence to serve on active duty. I am very proud of my record of service to the City of Minneapolis and truly regret that this compels me to give up my membership on the force. I have been diligent in maintaining my qualifications as a police officer while on leave. My assignments in the military have broadened my experience with significant supervisory and leadership roles in ways which could have benefited the Police Department: but for the fact that I was denied the opportunity to compete in the recent Sergeants promotional examination, my decision might have been otherwise. Indeed, I spent considerable time and effort in preparation for the exam, anticipating returning to the force with the prospect of a supervisory position.

Though I am disapointed to leave the department at this time, I am very appreciative of the support that I have been given and the opportunity I have had to accept several challenging assignments in the military. The Guard and the other Reserve

components need the support of employers in order to accomplish their mission of being ready and able to mobilize in the defense of State and Nation. Over the past several years the City of Minneapolis has been exemplary in this regard by accomodating my leave of absence.

Sincerely
/s/
Duane D. Paisley

EXHIBIT 5



1. NAME (Last, First, Middle)	2. DEPARTMENT, COMPONENT AND BR.	3. SOCIAL SECURITY NO.
[redacted]	ARMY/ARNG/MP	[redacted]

4. GRADE, RATE OR RANK	4a. PAY GRADE	5. DATE OF BIRTH (YYMMDD)	6. RESERVE OBLIG. TERM. DATE
CIV	06	440520	Year 00 Month 00 Day 00

7. PLACE OF ENTRY INTO ACTIVE DUTY	7a. HOME OF RECORD AT TIME OF ENTRY (City and State, or complete mailing address)
ST PAUL, MN	[redacted] MINNEAPOLIS, MN 55418

8. LAST DUTY ASSIGNMENT AND MAJOR COMMAND	8a. STATION WHERE SEPARATED
STARC MN (-) ST PAUL MN FORSCOM FC	FORT LEAVENWORTH, KANSAS 66027-5000

9. COMMAND TO WHICH TRANSFERRED	10. SGLI COVERAGE	None
DEAR CSHLSP (RET) RAPHCHN, 9700 PAGE BLVD, ST LOUIS, MO 63132	Amount: $ 100,000.00	

11. PRIMARY SPECIALTY (List number, title and years and months in specialty. List additional specialty numbers and titles involving periods of one or more years.)	12. RECORD OF SERVICE	Year(s)	Month(s)	Day(s)
31A00000D MILITARY POLICE OFFICER, GENERAL—14 YRS—10 MOS//11B00000D LIGHT INFANTRY OFFICER—14 YRS—10 MOS//41A00000D PERSONNEL PROGRAMS MANAGEMENT STAFF—11 YRS—3 MOS// NOTHING FOLLOWS	a. Date Entered AD This Period	79	11	01
	b. Separation Data This Period	94	08	11
	c. Net Active Service This Period	14	10	00
	d. Total Prior Active Service	01	04	11
	e. Total Prior Inactive Service	13	00	11
	f. Foreign Service	08	05	00
	g. Sea Service	00	00	00
	h. Effective Date of Pay Grade	88	04	26

13. DECORATIONS, MEDALS, BADGES, CITATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (all periods of service)

LEGION OF MERIT//MERITORIOUS SERVICE MEDAL 2ND AWARD//ARMY COMMENDATION MEDAL//ARMY ACHIEVEMENT MEDAL//NATIONAL DEFENSE SERVICE MEDAL 2ND AWARD//HUMANITARIAN SERVICE MEDAL//ARMED FORCES RESERVE MEDAL 3RD AWD//ARMY RESERVE COMPONENTS ACHIEVEMENT MEDAL 4TH AWARD//NAVE SERVICE RIBBON//EXPERT INFANTRYMAN BADGE//AIRCRAFT CREWMAN BADGE//CON'T IN BLOCK 13

14. MILITARY EDUCATION (Course title, number of weeks, and month and year completed)

SALES MANAGEMENT TRAINING, 1 WK, 1980//COMMAND AND GENERAL STAFF COLLEGE (NR), 1982//RECRUITING LABOR ACHIEVEMENT, 1 WK, 1987//COUNTERNARCOTICS PAYMENTS COURSE, 1 WK, 1992//ARMY WAR COLLEGE (NR), 1993//NOTHING FOLLOWS

15a. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERANS' EDUCATIONAL ASSISTANCE PROGRAM	Yes	No	15b. MEMBER WAIVED BENEFITS	Yes	No	16. DAYS ACCRUED LEAVE PAID
		X		X		54.5

17. SERVICE SCHOOLS COMPLETED (Civilian and military technical and correspondence courses)

18. REMARKS

BLOCK 13: US ARMY BASIC RECRUITER BADGE//SUBJECT TO ACTIVE DUTY RECALL BY THE SECRETARY OF THE ARMY//REPORT IS RENDERED AS PROVIDED BY SECTION 4403 OF THE FY 1993 NDAA (PL 103-484) AND MAY QUALIFY FOR A RECOMPUTATION OF RETIRED PAY AT AGE 62 (SECTION 4464 OF SAME LAW)./FORCES E-EXCEPT SUBJECT TO COMPUTER MATCHING WITHIN THE DOD OR WITH OTHER AGENCIES FOR VERIFICATION PURPOSES AND DETERMINING ELIGIBILITY OR COMPLIANCE FOR FEDERAL BENEFITS./NOTHING FOLLOWS

19a. MAILING ADDRESS AFTER SEPARATION (Include Zip Code)	19b. NEAREST RELATIVE (Name and address - Include Zip Code)
2721 HACKBERRY STREET #14 ROSEVILLE, MN 55113	[redacted] ADDRESS SAME AS 19A
20. MEMBER REQUESTS COPY 6 BE SENT TO [redacted] YES NO	21. OFFICIAL AUTHORIZED TO SIGN (Type name, grade or rank, organization and signature) [redacted]
22. SIGNATURE OF MEMBER BEING SEPARATED	
SIGNATURE NOT AVAILABLE FOR SIGNATURE	[redacted] CHIEF, PPD

SPECIAL ADDITIONAL INFORMATION (For use by authorized agencies only)

23. TYPE OF SEPARATION	24. CHARACTER OF SERVICE (Include upgrades)	
RECOMMENT	HONORABLE	
25. SEPARATION AUTHORITY	26. SEPARATION CODE	27. REENTRY CODE
AR 635-100, CHAP 4	MBE	3A

28. NARRATIVE REASON FOR SEPARATION

VOLUNTARY EARLY RETIREMENT

29. DATES OF TIME LOST DURING THIS PERIOD	30. MEMBER REQUESTS COPY 4
NONE	

DD Form 214, NOV 88 Previous editions are obsolete. 4

BEST AVAILABLE COPY

STATE OF MINNESOTA
DEPARTMENT OF MILITARY AFFAIRS
OFFICE OF THE ADJUTANT GENERAL
VETERANS SERVICE BUILDING
SAINT PAUL 55155-2098

ORDERS 78-25 7 JULY 1994

1. PAISLEY, DUANE D 476-46-5317 COL STARC-MN
(-) STATE AREA COMMAND, ST PAUL MN 55101-2597

You are reassigned as shown for separation processing.

Assigned to: U.S. Army Transition Point (W0VP03), Ft Leavenworth KS 66027-5080
Reporting date: 31 August 1994
Additional instructions: You will report to the Transition Point for preprocessing not later than 0800, 12 August 1994. Your transition leave will commence on 13 August 1994 and conclude on 31 August 1994. You are not authorized movement of household goods or dependents to Transition Point.

FOR ARMY USE
Auth: Army Regulation 635-200
18 years act Fed Svc on 1 Nov 81: No

HOR: Mpls MN	P1 EAD or OAD: St Paul MN
Scd date of sep: 31 Aug 94	Comp: ARNG/AGR
MDC: 7BO4	PEBD: NA
Format: 430	SPD: RBD

2. PAISLEY, DUANE D 476-46-5317 COL STARC-MN
(-) STATE AREA COMMAND, ST PAUL MN 55101-2597

You are retired from active service, released from assignment and duty, and, on the date following, placed on the retired list. On date placed on the retired list, you are transferred to the Retired Reserve and assigned to U.S. Army Reserve Control Group (Retired), U.S. Army Reserve Personnel Center, St Louis, Missouri 63132-5200.

Effective date: 31 August 1994
Retired grade of rank: Colonel
Date placed on retired list: 1 September 1994
DOB: 20 May 1944
Sex: Male
Retirement type and allotment code: Non-Disability (3)
Component: ARNGUS
Statute authorized retirement: Title 10 USC Section 3911
Other eligible laws: None
Vol Retirement: 16 years, 2 months, 11 days
Section 1405: 18 years, 5 months, 20 days
Basic pay: 29 years, 2 months, 22 days
Completed over 4 years of active service as Enl or WO: No
Member of the armed forces on 24 Sep 75: Yes

VETERANS' REEMPLOYMENT RIGHTS HANDBOOK

U.S. Department of Labor
Veterans' Employment and Training

PREFACE

This Handbook replaces the 1970 edition and is intended to assist those who are interested in or affected by the reemployment rights of veterans, reservists, members of the National Guard, or other persons protected by the veterans' reemployment rights statute. The basic purpose of that statute is to ease the transition of veterans from military status back into the civilian labor force.

These rights are governed by statute as interpreted by court decisions. Although the Department of Labor and the Veterans' Employment and Training Service (VETS) do not have the authority to issue administrative rulings having the effect of law in this field, the courts have accorded the Handbook "a measure of weight." The examples in this Handbook, which are not meant to be exhaustive, but illustrative only, are based on the Department's analysis of the statute, court decisions, and the legislative history.

This 1986 edition has utilized much of the 1970 text, with revisions to reflect amendments to the statute and progression of the case law. In a departure from the 1970 edition, margin citations have been added to the text to assist the reader in locating the pertinent provisions of the statute. All citations are to Title 38 of the United States Code. When male nouns and pronouns are used in this Handbook, they should be deemed to include the female gender as well. Males and females have equal rights under the statute.

Further Information about reemployment rights may be obtained at any Veterans' Employment and Training Service Office, or by writing to the Veterans' Employment and Training Service, Department of Labor, 200 Constitution Avenue NW, Washington, D.C. 20210.

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CHAPTER TWENTY-TWO

Waiver of Rights, Remedies, or Defenses

Since the rights and remedies created by the reemployment statute belong to the individual employee, they can be waived by the individual, in whole or in part. Nevertheless, since the purposes of the statute are remedial, waivers of rights or remedies will not readily be found to have occurred, and doubtful cases will be resolved in favor of the veteran. The burden of proving a waiver is on the party who claims that a waiver has occurred.

A veteran may waive his rights or remedies either expressly or impliedly by his conduct. An express waiver, whether oral or written, must surrender existing rights, not merely indicate an intention to refrain from claiming rights in the future. The conduct from which a waiver is implied must be clearly inconsistent with the pursuit of the right or remedy in question. Waiver is essentially a matter of intent, and the proof of an intent to waive must be clear, convincing, specific, and unequivocal. The veteran must be aware of the rights he is waiving, and the waiver must be a voluntary act on his part, not induced by fraud, misrepresentation, or pressure.

Only the veteran, or an agent he has authorized to make a waiver on his behalf, can waive his statutory rights. The fact that a union is the duly authorized agent for collective bargaining purposes, or for pressing grievances under the contract, does not empower the union to waive the veteran's rights or remedies under the statute. The Department of Labor, though charged by law with responsibility for assisting the veteran in determining and exercising rights under the statute, cannot waive any of those rights without specific authorization from him to do so.

Waiver of one right does not imply waiver of others. A waiver of rights under a collective bargaining agreement is not

a waiver of the statutory rights. Demands by the veteran for greater or other rights than he actually has under the law, if made with an honest, though mistaken, belief that he is legally entitled to the rights, does not imply a waiver of the statutory rights that he actually does have.

In all but the most unusual circumstances, a veteran cannot expressly or impliedly waive his reemployment rights before or during military service. Rights generally do not mature until the veteran requests reinstatement and rights not yet matured will not readily be considered to have been waived. An express waiver of future statutory reemployment rights, if required by the employer as a condition of the veteran's pro-service employment, is contrary to the public policy embodied in the statute and is void. Even if the veteran, before or during military service, voluntarily makes statements or taken actions clearly indicating an intent not to return to the employer, a waiver will not be implied from such statements or conduct because the statute was intended to keep that possibility open until the veteran returns to civilian life.

Whether a veteran has waived his rights during the 90-day application period (31 days in the case of a reservist or member of the National Guard returning from initial active duty for training) depends upon whether the potential waiver occurs before or after he has applied for and obtained a bona fide offer of reemployment, which is in compliance with his rights, and is considered by him to be in compliance with his rights. Until he is properly reemployed or has applied for reemployment, he can seek or take employment with other employers and engage in other conduct that might normally be considered inconsistent with an assertion of an employment relationship. No waiver will be implied from such actions if they are followed by an application for statutory rights within the 90-day period.

A rejection by the veteran of a proper offer of reinstatement, including any previously accrued wages, will amount to a waiver of rights, unless that rejection stems from a bonafide belief by the veteran that the offer does not comply with those rights. In that case, the rejection will waive only future compensation. This is true whether the offer and rejection occur within the 90-day application period or after that period has expired. Where the reemployment offered does not fully comply with the statutory requirements or is coupled with conditions not imposed by the law, the veteran's rejection of the offer does not valve his rights.

Acceptance by the veteran of a reemployment offer which falls short of full compliance with his rights, even if made does not waive any rights unless there is clear and convincing evidence of his intent to waive the right in question, and unless that intent was formed without misrepresentation, deception, or duress.

After a veteran has been properly reinstated, he will normally be considered to have waived future statutory rights if he voluntarily quits or fails to respond to a notice of recall if he has been placed in layoff status. An exception may arise if he is at some later time rehired as a new employee, and if by some action of his employer or a plan administrator, some benefit related to time spent in military service becomes available to other employees with similar breaks in service. The "sliver thread" of seniority is discussed further in Chapter 11.

When a veteran has statutory reemployment rights with two different employers, the exercising of such rights with one of them does not waive his rights with the other unless and until it becomes physically impossible to exercise reemployment rights with both employers. At that point, the veteran must choose one employer and valve any future rights with the other.

Like the substantive rights provided by the statute, the procedural remedies that it provides may also be waived by the veteran, in whole or in part, at any time after he has become entitled to statutory protection. The procedural remedies include the right to sue in the United States courts (either through the United States Attorney or through private counsel), to compel specific compliance by the employer, and to recover lost wages and other benefits. For example, even after suit has been filed for correction of violations plus compensation, the veteran can waive either the specific relief or the compensation without also waiving the other.

The veteran does not waive his remedies in the federal courts by attempting to obtain relief through a contractual grievance procedure. His participation in final and binding arbitration proceedings to determine his contractual rights does not waive his statutory rights.

Occasionally a question arises as to whether an employer, by reinstating the veteran or otherwise, has waived defenses that he would otherwise have against a claim by the veteran under the reemployment statute for the rights and benefits already accorded. The same general considerations that apply to waivers of rights or remedies by the veteran also apply to waivers of defenses by the employer. It is a question of intention, and the burden of proof is on the party who contends that a waiver has occurred. Court decisions dealing with waivers reflect less reluctance to find waivers by employers than by veterans.

Delay, inactivity, or patience alone by a veteran in pressing for statutory reemployment rights does imply a waiver of them. The effect of delay by the veteran is discussed in Chapter 23.

"Abandonment" and "estoppel," sometimes confused with "waiver," involve a different principle. Abandonment and estoppel generally involve some conduct or statement by one of the parties (employer or veteran) which leads the other

party to believe that something is true and causes him to act accordingly. It is the justified belief and action in reliance that gives rise to "abandonment" or "estoppel."

EXAMPLES

(1) Employee A leaves an other-than-temporary position with K Company when ordered to report for induction into military service. K Company then hires Employee B, but only after requiring B to sign an agreement that he acknowledges his employment to be temporary and he will not attempt to claim rights with K Company under the reemployment statute, since he is replacing an employee who will be entitled to return to the job. Eighteen months later, B is also drafted and the company hires C. When A returns and is reemployed, C is dismissed. When B returns, he applies to K Company for reinstatement but is told that he has expressly waived reemployment rights with them.

B cannot claim the job as against A, but he may be entitled by the law to some other job with K Company, depending on what would have happened if he had not gone into military service. The statute expressly protects a replacement for a veteran, if the replacement employee himself enters military service. The replacement employee's position is not considered to be temporary under the statute, and it cannot be made temporary by private agreement. If no other factors made B's position with K Company temporary, the agreement could not make it temporary either. B could not waive future reemployment rights before those rights came into existence.

(2) Employee D enlists in the Army for three years and withdraws the vested portion of his account under L Company's pension plan, which can only be done by quitting outright. Three years later, he writes to his supervisor stating that he has reenlisted for another three years and intends to

make the Army his career; however, six months after his reenlistment, D receives a medical discharge. He promptly applies to L Company for reemployment. L Company turns him down on the ground that by quitting and withdrawing his pension funds before military service, and by reenlisting with the admitted intention of pursuing an Army career, he waived his right to reinstatement.

There has been no effective waiver. The unexpected developments that occurred here illustrate one reason for the rule that unmatured reemployment rights cannot easily be waived. To assure himself of full credit for pension purposes, D may have to reimburse the fund in light of his previous withdrawal. Regardless of the status he may have in the pension plan, his right to full and prompt reinstatement in all other respects has not been waived.

(3) Because it considers Veteran E's replacement to be a better employee, Company M refuses to reemploy E when he returns from military service. E presses a claim for reinstatement and restoration of his seniority. The complaint is resolved two months after his application, when E and Company M agree that he will get his seniority back and a job paying a little more than the one he had claimed. Soon after being reemployed, E claims compensation for the wages and benefits he lost during the two-month delay. Company M asserts that by accepting the reemployment offer E had waived any right to compensation.

There has been no waiver of compensation in the absence of an express understanding on that point. Acceptance of one right does not imply a waiver of others, even if what is accepted is in excess of the statutory requirements.

(4) Same situation as in Example 3, except that M's offer to take E back in his proper position is expressly made conditional on E's waiving his back pay claim. M knows that E is broke and needs the job desperately because he has been unsuccessful in finding other employment. E accepts M's

terms. Two months later, after E has paid his most pressing bills, he presses M for the two months of back pay.

E's claim is valid, because the reinstatement offer was not in full compliance with his rights, and because he waiver of back pay was procured through duress.

(5) Immediately after release from active duty on September 15, 1977, Veteran F applies to N Company, his pre-service employer, for reinstatement. N Company makes a reinstatement offer which complies with his rights in every respect. F and N Company agree that F will resume his employment on Monday, September 25, so that the company can give ample notice to G, hired to replace F and now being displaced. In the meantime, F receives an employment offer from O Company. On Friday, September 22, F calls N Company to say that he will not be coming to work on the following Monday and that he will be going to work for O Company instead. N Company withdraws the termination notice that it had given to G. After several weeks with O Company, F finds that employment not to his liking, and he visits N Company to apply for reemployment. This occurs on December 1, within 90 days of F's release from active duty. N Company will take him back, but only as a new hire without seniority. F contends that he should be reemployed with seniority since the statute gave him the right to spend 90 days before applying for reemployment.

While it is true that the veteran has 90 days to shop around among employers or to refrain from working or seeking work during that period, it is also true that once he enters into an understanding for reinstatement with his pre-service employer, failing to fulfill that understanding casts doubt on the good faith of his application for reinstatement. The conclusion that F has waived his reemployment rights is justified, because a fully proper reinstatement offer was made, and F accepted it without reservations, either stated or implied. Without pressure or misrepresentation, F agreed to

return to work on a specific date. Then, of his own free will, he changed his mind. Because of the lack of cohesion of F's resolve and the chaos that this lack can cause the employer, it can be concluded that F has waived his rights.

(6) The facts are the same as in Example 5, except that instead of actually requesting reemployment immediately after his separation from the military, F merely inquired of N Company about employment opportunities, and N Company unilaterally directed F to report on September 25 without obtaining his agreement to do so.

In this situation, there has been no waiver, and F is entitled to reinstatement with seniority. His rights did not mature until his December 1 application for reinstatement.

(7) Because of a disagreement as to whether Veteran H's pre-service position with PQ Company was temporary or other-than-temporary, and as to whether H had left that employment for the purpose of entering military service, the company refuses to reinstate him when he makes a timely application. The Department of Labor investigates the case and eventually convinces the company that it was wrong. The company agrees to reinstate H and to pay back wages in an amount to be determined later. Then, it is discovered that H has found a better-paying job with RS Company, a competitor of PQ, beginning three weeks after H's reemployment application at PQ. PQ Company then withdraws its offer of reemployment and back pay on the ground that by taking employment with a competitor H has waived his reemployment rights at PQ.

H is still entitled to the offer of reemployment and to three weeks of back wages. A veteran who is denied reinstatement has a duty to mitigate his losses by seeking and, if possible, accepting other suitable employment. Waiver cannot be found from his acting accordingly.

(8) On January 1, 1983, Employee J left his position with T Company to enlist in military service for three years. Because

of slow business, J would have been laid off on July 1, 1983, if he had not been in military service at the time. The collective bargaining agreement provides that recall rights are valid for two years of continuous layoff. Because business remained slow for several years, it is possible to say with certainty that J would not have been recalled before July 1, 1985, when his recall rights would have expired. Business picks up substantially during the fall of 1985, and several new employees are hired. J completes his military service on December 31, 1985, and he applies for reinstatement on January 20, 1986.

T Company reemploys J with his original seniority date, thinking that it is required to do so by the reemployment statute. Other employees who are thus put behind J on the seniority roster complain to their union and the union files a grievance. After seeking legal counsel, T Company comes to understand that the reemployment statute did not insulate J from the effects to his seniority that would have occurred even if he had never joined the military. The company settles the grievance by changing J's seniority date to January 20, 1986. J complains to the Department of Labor, saying that the company has waived its defense by reinstating him with his pre-service seniority.

T company has not waived its defense. It acted originally under a mistake of law, and it can correct the mistake when it is brought to the company's attention.

(9) Employee AK is laid off by VW Company, but he has contractual recall rights under a collective bargaining agreement, in accordance with his seniority. He then obtains other than temporary employment with X Company, but he leaves that employment for military service a few months later. After his release from active duty, he applies to VW Company for reinstatement, but he is reinstated into layoff status because, although his seniority has not lapsed, business is still slow and his seniority still does not entitle him to active

employment. He then applies to X Company and is reinstated on the job. Four months later, he gets a recall notice from VW Company, by registered mail.

If AK does not respond to the recall notice within the specified time, he waives his reemployment rights with VW Company. If he responds and goes back to work at VW Company, leaving his job at X Company, he thereby waives any further reemployment rights at X Company. If he is unable to work both places at the same time, the recall notice forces him to make a choice.

(10) D was a salaried clerk when he left Company R in 1977 for military service. When he returns in 1980 seeking reemployment, R's Personnel Manager, Q, tells D that if he will accept an hourly position on the production line in another bargaining unit and department, R Company will adjust his seniority in the new department to include his military service. D accepts the offer and foregoes a reemployment rights claim. Q retires in 1983, and the new Personnel Manager, X, adjusts D's departmental seniority to 1980. There is a reduction in force, and all employees with departmental seniority dates after 1979 are laid off. D files a claim with the Department of Labor. R Company claims that D waived his rights by accepting the new position.

D's claim is valid. R Company is estopped from asserting a waiver because R Company induced D to accept the position by telling him that his Seniority date would be adjusted. D relied on that statement in accepting the new position and in dropping his original claim.